Counsel for the fourth defendant raises two preliminary objections on point of law. Each of the counsel for the other three defendants also opposes the application. The first preliminary objection is that, since the fourth defendant is a Government servant, by implication, the Government of Malaysia is being sued. As such, under Order 1A rule 3 of the Rules of the Supreme Court, notice in lieu of service should be served on the fourth defendant. The fourth defendant has, however, been served only with an unsealed copy of the notice. Counsel for the plaintiff concedes that an unsealed copy of the notice was served on the Attorney-General. Since the Attorney-General has accepted service without objection and in view of the undertaking of counsel for the plaintiff to serve him with a sealed copy, I do not think the plaintiff's application should be dismissed merely on this ground. At the most, the defect is an irregularity which can be cured by Order 70 of the Rules of the Supreme Court.

On the second preliminary objection, it is submitted that since the notice of motion is in the nature of an application for an injunction, by virtue of the proviso to section 29(1) of the Government Proceedings Ordinance, 1956, the court can only make a declaratory order but it cannot grant an injunction against the fourth defendant who is a Government officer. In my judgment, the second preliminary objection is well taken. Section 29(1)(a) provides:

"In any civil proceedings by or against the Government the court shall, subject to the provisions of this Ordinance, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require: Provided that (a) where in any proceedings against the Government any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties."

By virtue of section 2(3), the above provision shall be construed as including a reference to civil proceedings to which any officer of a Government is a party.

From proviso (a) to section 29(1), it is clear that the court cannot grant the order as prayed in the notice of motion. Further, under section 54(d) of the Specific Relief Act, 1950 (Act 137), it is provided that:

"An injunction cannot be granted to interfere with the public duties of any department of any Government in Malaysia, or with the sovereign acts of a foreign Government."

Counsel for the plaintiff in fact concedes that the court can only grant a declaratory order against the fourth defendant. As such, the notice of motion as it stands must fail. In my judgment, such declaratory order must be confined to the rights of the parties, and, even if the notice of motion is amended at this stage, no interim declaratory order can be made.

In conclusion, it is submitted by counsel for the plaintiff that the present application is made pursuant to section 417 of the National Land Code. Subsection (1) of that section states:

"The court or a judge may by order direct the Registrar or any collector to do all such things as may be necessary to give effect to any judgment or order given or made in any proceedings relating to land, and it shall be the duty of the registrar or collector to comply with the order forthwith."

In my view, the purported application under section 417 of the National Land Code is misconceived and premature. An order under that section can only be made after a judgment has been given by the court. Generally, that section is invoked to obtain consequential reliefs for the purpose of giving effect to any judgment or order concerning land or interests in land even if the Collector or the Registrar of Titles is not made a party to the civil proceedings.

For the above reasons, the second preliminary objection is upheld. The plaintiff's notice of motion is accordingly dismissed with costs.

Order accordingly.

Solicitors: *A. Kanesalingam & Co.; Skrine & Co.; Chellappah Thambiah; P.S. Moorthy.*

RE LEE MAH REALTY SDN. BHD.; SONG KUENG POH v. LIEW CHOCK SANG & ORS.

[O.C.J. (Harun J.) April 18 and 25, 1979]
[Kuala Lumpur — Origination Petition No. 8 of 1979]

Company Law — Application under section 181 — Whether by Originating Petition or by Originating Motion — Companies Act, 1965, s. 181.

Practice and Procedure — Procedure of application under Companies Act, 1965 — R.S.C., 1957, O. 53B.

In this application under section 181 of the Companies Act, 1965 on a preliminary objection it was contended that the proceedings should not have been commenced by Originating Petition but Originating Motion.

Held: (1) section 181 of the Companies Act, 1965 dealt with remedies in cases of oppression of shareholders by the directors of a company. By its very nature, it is contentious and such an application seeking remedies should set out the acts of oppression complained of. This could be achieved if the Originating Petition procedure was used;

(2) the correct procedure to commence an application under section 181 was by petition and accordingly the proceedings herein were properly commenced.

Cases referred to:-

(1) *Re Coliseum Stand Car Service Ltd.* [1972] 1 M.L.J. 109.
(2) *Re Kong Thai Sawmill (Miri) Sdn. Bhd.* [1978] 2 M.L.J. 227.
(3) *Re Meister Lucius & Bruning Ltd.* [1914] W.N. 390.
(4) *Re United Iron Mining Co. Ltd.* [1970] 1 M.L.J. 105.
(5) *Tan Chwee Geok & Anor.* v. *Khaw Yen-Yen & Anor.* [1975] 2 M.L.J. 188.

ORIGINATING PETITION.

P. Cumaraswamy (*Miss S. Sharma* with him) for the petitioner.

S.D.K. Peddie for the respondents.

Cur. Adv. Vult.

Harun J.: This is an application under section 181 of the Companies Act, 1965. On a preliminary objection, it is contended that these proceedings should not have been commenced by Originating Petition but by Originating Motion. The authorities cited for this

proposition are: (i) *Re Coliseum Stand Car Service Ltd.*[1] and (ii) *Re Kong Thai Sawmill (MIRI) Sdn. Bhd.*[2]

Both these cases were also applications under section 181 of the Companies Act and were commenced by Originating Motion but in considering them it should be noted that:

(i) The *Coliseum Stand Car Service* case was heard in August, 1971;

(ii) The *Kong Thai Sawmill* case was instituted in September, 1971;

(iii) The Companies Act, 1965 came into force on April 15, 1966; and

(iv) R.S.C. Order 53B was in respect of applications under the Companies Ordinance, 1940 and was not amended to regulate applications under the Companies Act, 1965 until June 2, 1972 by P.U. (A) 156/1972.

It is common ground that in 1971, there was no set procedure to commence applications under section 181 of the Companies Act, 1965. It is in this context that Abdul Hamid J. in the *Coliseum Stand Car Service* case at page 111 on the authority of *Re Meister Lucius & Bruning Ltd.*[3]* (which held that "where an Act merely provided for an application and did not say in what form that application was to be made, as a matter of procedure it might be made in any way in which the court could be approached.") ruled that such an application "*may* nevertheless be proceeded by way of Originating Motion". It was contended in that case that the application should have been commenced by Originating Petition, the very opposite argument in the present case.

In *Kong Thai Sawmill* the following passage appears at page 228:

"The procedure by Originating Motion is, their Lordships accept, in accordance with the law in Malaysia, but, since it is confined to stating the relief asked for, without setting out the case for such relief, or making any definite allegations in support, it may be embarrassing for those concerned to oppose it and for the court." *per* Lord Wilberforce.

If the judgment is considered as a whole, it will be found that that passage is *obiter dicta* but nonetheless it is noteworthy that the Privy Council is critical of the Originating Motion procedure.

Section 181 of the Companies Act, 1965 deals with remedies in cases of oppression of shareholders by the directors of a company. By its very nature, it is contentious and such an application seeking remedies should set out the acts of oppression complained of. This is achieved if the Originating Petition procedure is used whereas the Originating Motion procedure is only a licence to embark on a fishing expedition. The equivalent provision of our section 181 in England is section 210 of the Companies Act, 1948 which specifically provides that such an application be made by petition. Section 186 of the Australian Companies Act is also similar to our section 181 with no specified procedure but the practice there is to proceed by petition. Indeed in *Re United Iron Mining Co. Ltd.*,[4] an application under section 181 was commenced by petition and this procedure was not even at issue.

For the reasons stated, I am of the view that the *Coliseum Stand Car Service* and *Kong Thai Sawmill* cases are not authorities for the proposition that an application under section 181 of the Companies Act, 1965 shall be commenced by Originating Motion, at least not to-day.

The amended R.S.C. Order 53B sets out the procedure for all types of applications under the Companies Act, 1965 specifying by

Rule 5 — Applications by petition;

Rule 6 — Applications by motion or summons;

Rule 7 — Applications by motion; and

Rule 8 — Applications by summons.

Alas section 181 has been omitted from this very exhaustive list and is therefore covered by rule 15 which reads:

"Except in the case of the applications mentioned in Rules 5, 6 and 7 and applications made in proceedings relating to the winding-up of companies, every application under the Act must be made by Summons."

Rule 15 would appear to remove any doubt as to what the correct procedure is. In my view, however, this is not necessarily so. It has been observed that applications under section 181 are contentious matters and to proceed by summons is the least appropriate procedure. In view of the very detailed provisions of Order 53B, it might well be that section 181 was inadvertently omitted. Order 53B bears a very strong resemblance to the English Order 53B (1957) but in England the omission is intentional because the procedure by petition is contained in section 210 of the Companies Act itself. I am therefore inclined to the view that the specific omission of section 181 in our Order 53B is a draftsman's error.

Be that as it may, I am of the opinion that we are not bound by rule 15 to proceed by summons in respect of applications under section 181. I am fortified in my view by the course taken by the Federal Court in *Tan Chwee Geok & Anor.* v. *Khaw Yen-Yen & Anor.*[5] In that case it was contended that the matters complained of should have been commenced by motion or summons in compliance with Order 53B rule 6. Suffian L.P. at page 188 said:

"With respect I do not think there is any merit in this argument. It is obvious from the correspondence that we have seen in the appeal record, and from the exchanges between counsel before us, that this is going to be a hotly contested case, and that being so the best way of resolving the contest is by a proper action started by way of writ, and so on. If the plaintiffs had applied by motion or summons, there would have to be a full-scale trial with witnesses giving evidence and all, if the court is to decide on the matters in controversy."

Here there was a specific provision in rule 6 to commence the proceedings by motion or summons and yet the Federal Court held that it be proceeded with by way of writ. In the present case, rule 15 applies only by default and *a fortiori* its compliance in the circumstances of an application under section 181 is even less compelling.

Our section 181 of the Companies Act derives its ancestry from the English and Australian Acts.

* Followed in *Nanyang Development (1966) Sdn. Bhd.* v. *How Swee Poh* [1969] 1 M.L.J. 232.

Our rules of procedure are distinctly English. Both in England and Australia applications such as the one here are commenced by petition and I can see no reason why we should not follow the same procedure.

I, therefore, hold that the correct procedure to commence an application under section 181 of the Companies Act, 1965 is by petition and accordingly these proceedings are properly commenced.

Order accordingly.

Solicitors: *Sharma & Co.; Skrine & Co.*

PUBLIC PROSECUTOR v. DATUK TAN CHENG SWEE & ORS.

[O.Cr.J. (Ajaib Singh J.) May 5, 1979]

[Malacca — Criminal Trial Nos. 1, 2 & 3 of 1977]

Criminal Law and Procedure — Charge of corruption — Whether Commissioner of Malacca Municipality a public officer — Meaning of "public officer" — Corrupt practice — Mens rea not established — Municipal Ordinance (S.S. Cap. 133), ss. 396(1) — Prevention of Corruption Act, 1961 (Act 57), s. 21 — Emergency (Essential Powers) Ordinance, 1970, s. 2 — Interpretation Act, 1967, s. 3 — Federal Constitution art. 132(1).

In this case the first accused had been charged as a public officer in his capacity as Commissioner of the Malacca Municipality with corrupt practice in the approval of plans. The other accused had been charged with abetment of the offence. At the original trial the learned trial judge acquitted all the accused — See [1979] 1 M.L.J. 166. The Public Prosecutor, appealed against the acquittal of the first, second and fourth accused but not against the acquittal of the third accused. The Federal Court set aside the order of acquittal in respect of the first and second accused — the first and second respondents — and directed that they be called on for their defence. The acquittal of the fourth accused was upheld — See [1979] 1 M.L.J. 166 at p. 174.

Held, acquitting the accused: (1) although the decision of the Federal Court on the meaning of the term "public officer" is not authoritatively binding, it should not be disregarded in this case;

(2) the prosecution has failed to prove beyond reasonable doubt that the first accused knew that the files which he was dealing with when he signed his approval were those of Almac, with which he was connected. When the plans were approved, the first and second accused derived no pecuniary or other advantage over and above their lawful shares from the profits of Almac;

(3) there was no evidence to connect the second accused with the first accused in the sense that he had instigated or conspired or intentionally aided in the commission of any offence by the first accused.

Cases referred to:-

(1) *Public Prosecutor* v. *Phee Joo Teik* [1962] M.L.J. 56.
(2) *R.* v. *Samuel Vaughan* 98 E.R. 308.
(3) *Henley* v. *The Mayor and Burgesses of Lyme* 103 E.R. 995.
(4) *R.* v. *Whitaker* [1914] 3 K.B. 1283.
(5) *Dilworth v. Commissioner of Stamps* [1899] A.C. 99, 105.
(6) *Haydon* v. *Kent County Council* [1978] 1 Q.B. 343.

CRIMINAL TRIAL.

Dato Abu Talib bin Othman, Solicitor-General, (*T.S. Sambanthamurthi* with him) for the Public Prosecutor.

M. Shankar for the 1st accused.

Sulaiman C. Navarednam for the 2nd accused.

Ajaib Singh J.: The 1st accused in this case was charged with three counts under section 2(1) of the Emergency (Essential Powers) Ordinance No. 22 of 1970. The 2nd accused was charged with abetting the 1st accused on the 1st and 2nd charges under section 109 of the Penal Code while the 3rd and 4th accused were charged with abetting the 1st accused on all the three charges. At the close of the case for the prosecution on February 4, 1978 I acquitted and discharged all the four accused without calling for their defence on the ground that the prosecution had failed to prove that the 1st accused was a public officer within the meaning of section 2 of the Prevention of Corruption Act, 1961 (Revised — 1971) and that the prosecution had not produced sufficient evidence against the remaining three accused to establish *mens rea* or the intent to aid and abet the commission of the principal offences.

The Public Prosecutor appealed against the acquittal of the 1st, 2nd and 4th accused but not against the acquittal of the 3rd accused. On October 21, 1978 the Federal Court set aside the order of acquittal in respect of the 1st and 2nd accused and directed that they be called upon to make their defence. The acquittal of the 4th accused was upheld.

The 1st and 2nd accused have now given evidence on oath and they have adopted their statements which they had given to the police and which were admitted in evidence during the case for the prosecution. In his defence the 1st accused stated that as the Commissioner he had no choice but to sign the minutes which related to the lay-out and building plans and he did so in good faith. He said that he relied entirely on the recommendations of the Municipal Engineer and those of the Building Sub-Committee and he always accepted their recommendations whether they were for approval or for rejection of the plans. He did not go to the Municipality every day. He went there when he was free and he would spend about half an hour to one hour in his room where he would have about 30 to 40 files to deal with. The files would be lying in a corner of the room and the office boy would bring them up to his table and open 10 to 15 files at a time — all opened at the relevant pages and pass them over to him. He would look at the rubber stamp and would sign at the appropriate minutes and put away the opened files on one side of the table. The office boy would then pass over another set of opened files to be signed. When he had signed all the files the office boy would take them away to the Municipal Engineer's Department. After he had signed the files he never saw them again until they were shown to him by the police when they recorded his statement.

The 1st accused said that when he signed the minutes relating to the three charges as well as the minutes in the amalgamation and sub-division files he was not aware who the applicants were. He merely followed the recommendations and signed his approval. He was not aware that the files related to Almac and even if he knew it he would still have signed his approval because that was his duty and he was acting in good faith on the recommendations of the Building Sub-Committee. He denied that he had specially invited the 2nd accused to sit at the second meeting of